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AMICUS CURIAE BRIEF OF THE SONGWRITERS GUILD OF AMERICA IN SUPPORT OF RESPONDENT SHELDON ABEND, dba AUTHORS RESEARCH COMPANY

Pursuant to Rule 36.2 of this Court and with the written consent of the parties, the Songwriters Guild of America submits this brief as amicus curiae in support of Respondent

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THE INTEREST OF THE SONGWRITERS GUILD OF AMERICA

The Songwriters Guild of America ("SGA") is the leading American organization of professional composers and lyricists, with offices in New York

City, Los Angeles and Nashville. Its membership consists of over 4,000 living songwriters and in excess of 600 estates of deceased songwriters. SGA, formerly American Guild of Authors and Composers, was founded in 1931 to further the professional interests of songwriters, especially in their dealings with music publishers and other copyright users. Its members include such renowned composers and lyricists, or their estates, as Richard Rodgers, Oscar Hammerstein II, Cole Porter, Johnny Mercer, Duke Ellington, Charles Strouse, Nat Cole, Samuel Barber, Marvin Hamlisch, Stephen Sondheim, George David Weiss, Sammy Cahn, Burton Lane, Bob Dylan, Johnny Cash, Barry Manilow, Henry Mancini, Quincy Jones, Dorothy Fields, Burt Bacharach, and Elie Seigmeister.

The instant case and that of Rohauer v. Killiam Shows, Inc., 551 F.2d 484 (2d Cir.) cert. denied, 431 U.S. 949 (1977), involve motion pictures. Without denigrating the interests involved in the motion picture industry, we submit that any decision involving the ownership of renewal term rights should consider the broad spectrum of those who will be affected, especially when equity is applied.

We urge that the decision below be affirmed to protect the interests of songwriters, and, most particularly, their widows, widowers, children and estates, the latter group being important beneficiaries of the renewal terms.

The livelihood of songwriters depends in large part on the exploitation of their compositions through

the sale of recordings.* Thus, a principal source of songwriters' royalties is derivative works.**

The equities cited by Petitioner herein have little or no

* The other principal source of songwriters' income is performance royalties, which are collected by ASCAP and BMI. These are not significantly affected by derivative works. Most performance royalties are generated by the broadcast playing of phonograph records. Royalties are paid for such performances on the copyrights in the original works (i.e., on the original music and lyrics). The copyright in a sound recording excludes any right of performance, and there is no copyright in the arrangement embodied in a recording. 17 USC §§ 114(a) and 115(a)(2). While some ASCAP and BMI royalties may be attributable to the performance of copyrighted derivative works, such as arrangements which are sufficiently original to be separately copyrightable (see Bourne Co. v. MPL Communications, Inc., 675 F. Supp. 659, 864, fn. 8 (S.D.N.Y. 1987)), or audio-visual materials, the total amount of such royalties appears to be insignificant.

**The Copyright Act of 1976 expressly defines "derivative work" as including a "sound recording" and a "musical arrangement." 17 U.S.C. §1 (1976 ed.)

application to the exploitation of music. As a result of compulsory licensing of recordings, the concept of "copyright death," or, denial of public access to works, has virtually no significance with respect to the issue before this Court as it relates to music.

In summary, affirmance of the decision below is consistent with the intent of the renewal term provision: to afford authors and their families a "second chance" to be rewarded for authors' creative efforts. It will not result in inequities to record companies, broadcasters and performers, since they will not be denied the opportunity to exploit their musical arrangements during the renewal term of copyright.

SUMMARY OF ARGUMENT

We submit that the decision in Rohauer v. Killiam Shows, Inc., 551 F.2d 484 (2d Cir.) cert. denied, 431 U.S. 449 (1977), is inconsistent with this Court's decision in Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373 (1960), and the basic rationale of the renewal provisions.

The Rohauer court's reliance upon equitable considerations was misplaced and failed to consider the broad spectrum of creators and users of copyrighted works.

Judge Friendly focused upon limited situations where the author's successor withholds consent to permit continued exploitation of a derivative work as to which the contributions are more important than the original.

Such considerations would

rarely apply to musical compositions. The original song is invariably more important than whatever has been added to create its derivative forms, and consent to continued exploitation is guaranteed by compulsory licensing, the roles of performing rights societies, and the economic self-interest of the author's family in exploiting the property to its fullest.

ARGUMENT

I. The Rohauer Rule Is Inconsistent With The Purposes of The 1909 Act

The two-term scheme of section 24 of the Copyright Act of 1909 ("the 1909 Act"), which has been preserved by the 1976 Act, was promulgated to permit authors or their families a "second chance" to reap the rewards of their creativity. 2 M & D. Nimmer, Nimmer on Copyright §9.02 (1989). As this Court

has stated:

> The evident purpose of §24 is to provide for the family of the author after his death. Since the author cannot assign his family's renewal rights, §24 takes the form of a compulsory bequest of the copyright to the designated persons.

DeSylva v. Ballentine, 351 U.S. 570, 584 (1956).

In Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373 (1960), this Court held that an author's assignment of his renewal term rights was unenforceable where he failed to survive the initial 28-year term of copyright. The author was a composer of "Moonlight and Roses." The renewal term assignee was a music publisher who had acquired those rights from the composer during the initial term of copyright.

Petitioner attempts to distinguish Miller Music from the facts of the instant case, on the ground that "there was no derivative copyright with sections 7 and 24 rights at stake."* Petitioner's Brief at 28. This distinction has no significance, since Petitioner has failed to set forth any persuasive rationale to validate the grant of renewal term rights to a derivative work user, where, under Miller Music, such a grant is concededly ineffective as to the publisher. Since

*Although the opinions in Miller Music did not disclose the exploitation of "Moonlight and Roses," as of 1950 there were 9 recordings of the composition by major artists. The song was also performed in the 1940 motion picture "Tin Pan Alley." Kinkle, The Complete Encyclopedia of Popular Music and Jazz, 1900-1950 (1974), pp. 359, 947, 1013, 1401, 1545, 1550, 1681, 1973, 1981, 1994. Accordingly, derivative renewal interests were very implicated in Miller Music.

the entire bundle of rights in a copyright reverts to the author's successors under Miller Music, it would be incongruous to exclude part of that bundle from reversion in the absence of a clear statutory exception. It is significant that section 24 of the 1909 Act expressly exempted compilations from the underlying author's right of reversion, but omitted any exemption for derivative works.

II. Policy Considerations Do Not Support The Rohauer Decision

Petitioner acknowledges that the legislative history of the renewal term provision of the 1909 Act shows "a preference that authors or their successors should prevail over mere publishers' assignees in claims for the renewal term." Petitioner's Brief at 11. Petitioner further concedes that

the Rohauer court could find no compelling statutory language or legislative history, or unanimity among the commentators, to support the decision in that case, and that as a result, Judge Friendly based his decision upon policy considerations, which Petitioner urges on this appeal.

It is respectfully submitted that the equitable arguments set forth by Judge Friendly or Petitioner herein have little, if any, application to those who exploit derivative musical works in the renewal term.

First, Petitioner contends that the decision below would foreshorten the copyright terms of derivative works. This would rarely occur with music, where principal exploitation is by recording companies, the playing of music over television and radio, and

public performances in night clubs, theatres and concert halls.

Affirmance of the decision below will in no manner prevent or even inhibit the continued exploitation of derivative music by these users throughout the renewal term. Record companies can continue to manufacture and sell phonograph records, tapes and compact disks without the consent of the copyright owner simply by paying a statutory royalty as provided by sections 115 and 801 of the Act. Under the Rohauer decision, however, families of deceased songwriters will be deprived of valuable income, because unfavorable licensing agreements made in the first term of copyright could continue under the old terms during the renewal period. For example, prior to 1978, mechanical licenses were issued at the

maximum rate of two cents a copy for each song on a recording (the rate then provided for by section 1(e) the 1909 Copyright Act's compulsory license provision). In many cases, lower rates were negotiated by record companies. As of January 1, 1988, the compulsory license rate was increased to 5.25 cents a copy, and that rate increases to 5.7 cents in January 1990. 37 C.F.R. §307.3. It would be inequitable to deprive the songwriter's family of the right to negotiate for royalty rates which presently reflect the current economic ability of record companies to pay.

The other major source of songwriting income is from royalties received from performing rights societies (i.e., ASCAP and BMI). As noted above (p. 4, fn.), the greater

part of such royalties and the performances which generate them do not come from derivative works copyrights. Even in cases where derivative works copyrights are exploited for performances of compositions over radio and television and in night clubs and concerts, as long as the songwriter's successors retain their membership in a performing rights society, such performances will continue uninterrupted pursuant to the authorization given by the successors to ASCAP or BMI. See, Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979).

There are instances in which a statutory successor could refuse consent to continued use of a work. One example is when a song previously written and exploited is licensed for use in a motion picture, as contrasted with the more prevalent practice of

commissioning new music for use in a movie's soundtrack on an employment-for-hire basis. However, compared to the usual manner in which music is exploited, the opportunities for "copyright death" with respect to musical compositions are de minimis and those conflicts can be effectively resolved by the solution of the court below in requiring compensation in lieu of injunctive relief.

Secondly, Petitioner argues that the renewal right was intended to afford the statutory successor the second chance to exploit the "prior work" only. Petitioner's Brief at 34. This would be of little solace to the families of the songwriters who would be deprived of the opportunity to receive increased royalties from the sale in the renewal term of various

versions of a composition which have been recorded in the first term of copyright.

Petitioner also refers to Judge Friendly's discussion in Rohauer of instances in which the creator of the derivative work has made a greater contribution than the author of the original. With respect to songs, the original is invariably far more important than the changes which have been added by the arranger.

Judge Friendly recognized the situation where the derivative work licensee/assignee has added little or no value to the original work, such as "[w]here an assignee or licensee has done nothing more than print, publish and distribute..." the work. 351 F.2d at 439. In these situations, Petitioner suggests, the author's

remedy is to limit the duration of exploitation by contract. Such a solution is hardly applicable to music, since, as discussed above, most exploitation of derivative works in the renewal term will occur through mechanical licensing, which, as a matter of statute, precludes the withholding of the songwriter's consent. Moreover, composers rarely have any reason to limit the exploitation of their songs. The more recordings and performances of their music, the greater the song's popularity and its rewards. Even if it were legal or practical for composers to withhold consent to renewal term usage, it would be contrary to their economic interests to do so.

Petitioner further argues that the derivative work's owner cannot protect against the contingency of the

underlying author's death prior to the vesting of the renewal term. Given the role of compulsory licensing and performing rights societies, this is almost a non-factor in the music field.

Finally, Petitioner urges that section 24's "second chance" policy is intended to favor the creator of the derivative work as much as the author of the underlying work.

The argument that there should be a standoff in equities between the author of the original work and the author of the derivative work could apply only where the contributions of each were relatively equal. As discussed above, this is not the case as between the composer of a musical composition and a subsequent arranger.

III. The Copyright Act of 1976 Does Not Support Petitioners' Argument

Petitioner's reliance upon sections 203(b)(1) and 304(c)(6)(A), the termination provisions of the 1976 Act, is misplaced. Congress provided by very specific language that a "derivative work" is excluded from the newly-legislated right of termination. Assuming, arguendo, that the instant issue was unclear at the time of the enactment of the 1976 Act, Congress could have adopted Petitioner's position by expressly providing that derivative works be excepted from the reversionary rights of authors in the renewal term. Its declination to do so, while expressly providing such an exception for derivative works in the newly-added extended terms, can hardly support an argument that Congress

intended that the exemption be implied with respect to the 28-year renewal period.

IV. The Fair Use Defense Is Not Available

Petitioner's fair use arguments are wholly inapplicable to the music field, given that three of the traditional four factors would compel a finding of unfair use.

First, the uses of music involved are commercial exploitation. In addition, with respect to the amount of use, an arrangement of music invariably embodies all or substantially all of the composition as originally written. While an arrangement may enhance a work, it would be valueless without the original.

One must also question the logic of any fair use argument as it

applies to the exploitation of derivative works in the renewal term. Certainly it cannot be contended that the fair use doctrine would have permitted the underlying story of "Rear Window" to be used by the motion picture company without the author's permission in the first term of copyright. If the Copyright Act renders unenforceable the author's grant of renewal term rights, how can it be claimed that the use becomes fair in the renewal period?

CONCLUSION

For the reasons stated above, it is respectfully submitted that the decision of the court below be affirmed.

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